

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
July 22, 2008 Session

**STEPHANIE CHRISTMON LEEPER v.
KEITH ANTHONY LEEPER**

**Appeal from the Circuit Court for Washington County
No. 23588 Jean Stanley, Judge**

No. E2007-02229-COA-R3-CV - FILED AUGUST 15, 2008

Stephanie Christmon Leeper (“Mother”) and Keith Anthony Leeper (“Father”) were divorced on July 7, 2005. In the Final Decree of Divorce, Mother was designated the primary residential parent of the parties’ two minor daughters. No appeal was taken from the Final Decree. Father filed numerous motions after entry of the Final Decree claiming Mother was in contempt of court for not following the mandates of the Final Decree. Nowhere in these pleadings did Father request a change in primary residential parent status. There were several hearings conducted on the various post-Final Decree motions. Following the latest of these hearings, the Trial Court changed custody and designated Father as the children’s primary residential parent. Mother appeals raising numerous issues, including a claim that her due process rights were violated when the Trial Court changed custody without Father ever having filed a pleading requesting such a change. We agree with Mother and vacate the judgment of the Trial Court designating Father the children’s primary residential parent.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the
Circuit Court Vacated; Case Remanded**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

Ricky A.W. Curtis, Blountville, Tennessee, for the Appellant, Stephanie Christmon Leeper.

Thomas C. Jessee, Johnson City, Tennessee, for the Appellee, Keith Anthony Leeper.

OPINION

Background

The dispositive issue in this appeal is whether Mother was given adequate notice that Father was seeking a change in primary residential parent status with regard to the parties' two daughters, who are currently ages 14 and 16. Our answer is "no."

The record in this case begins with the Final Decree of Divorce entered by the Trial Court on July 7, 2005. Although the Final Decree does not explicitly state that Mother was designated the children's primary residential parent, it is clear that she was so designated. The Trial Court addressed Father's co-parenting time as follows:

The Court has previously ordered that the children shall have visitation with their Father on a supervised basis once a week for one and a half hours a week. The Court finds that this supervised visitation should continue and the parties are directed to make other provisions than the use of the Department of Children[']s Services as the Court finds that the Department of Children[']s Services shall be allowed to withdraw from the supervision of this visitation. The Court orders the parties to counseling to try to reestablish a relationship between the parties' two minor children and their Father. The Court orders that plaintiff and defendant shall attend separate counseling and the children shall attend separate counseling in the hope of improving the relationship between father and daughters.

Plaintiff has filed a motion to relocate. The plaintiff is a physician who has been offered a teaching position at Texas Tech University. The Court finds that the plaintiff will earn more money on a guaranteed basis, that the school system has special programs for the parties' children, and the plaintiff will be able to work in a field in which she is board certified and the Court finds that the move is not vindictive. The Court does find that the plaintiff appears to lack serious motivation to reconcile the children with their father. The plaintiff shall make every reasonable effort to foster a good relationship between the parties' minor children and their father. The Court will keep jurisdiction of this case and will make rulings with regard to the parties' minor children based upon their best interest as well as the counseling and improvement of the parties' situation with regard to reuniting the children with their father [on] a more normal visitation basis. The Court finds that plaintiff's motion to relocate is well-taken and plaintiff and the parties' children shall be entitled to move to Amarillo, Texas.

The children shall come to Tennessee for one week during the summers of 2005 and 2006. The children shall also come to Tennessee one week during their Christmas holiday from school in 2005 from December 26, 2005 and returned to Plaintiff before 2:00 p.m. the day before school begins after the Christmas holiday break....

In the Final Decree, the Trial Court adopted a Permanent Parenting Plan which was attached to the Final Decree. The Child Support Worksheet attached to Permanent Parenting Plan does state that Mother is designated the primary residential parent. No appeal was taken from the Final Decree.

After the Final Decree was entered, Father filed a series of motions seeking to have Mother held in contempt of court. Two of these were filed on Father's behalf by his attorney, and several others were filed by Father pro se. The primary crux of these motions was Father's claim that Mother was not following the mandates of the Final Decree and was continuing to intentionally thwart Father's attempts to improve his relationship with the children. Father also sought unsupervised visitation. There were additional allegations with regard to whether Mother was complying with the requirements of the Final Decree with regard to the property distribution. At no time in anything filed with the Trial Court did Father request a change in custody. Mother responded to these motions and denied she was in contempt of court. Mother also claimed that Father was in contempt of court.

The Trial Court entered several orders as the post-Final Decree motions continued to be filed. These orders addressed the matters put at issue by the parties, including, but not limited to: (1) the attempt to sell the marital residence; (2) health care issues surrounding the children; and (3) Father's allegedly unsuccessful attempts to contact the children. The parties' inability to get along and agree on anything reached the point that the original trial judge, Thomas J. Seeley, Jr., understandably became so frustrated with the parties that he felt it necessary to recuse himself from the case. In an order entered on December 16, 2005, Judge Seeley stated:

The Court is frustrated with this case. The Court finds that this case must come to an end and will consider sanctions in the future if frivolous motions are brought by either party. This Court will not hear this case in the future and will refer it to Judge Jean Stanley for any future motions that are filed in this cause....

After the case was transferred to Judge Stanley, the Trial Court issued an order stating, in relevant part, as follows:

1. That the trial on all issues raised by Mother and Father shall be held on July 12, 2006....
2. Mother's presence at the hearing is required by the Court.

3. The parties' minor children shall be present in the State of Tennessee for visitation with their Father on July 17, 2006 through July 24, 2006 for his week of supervised visitation with his daughters. The previous week of visitation set by Mother shall be canceled.

* * *

5. The Court declines to rule at this time on any other issues and will decide same at the hearing in this cause on July 12, 2006....

A hearing took place as scheduled on July 12, 2006. Following the hearing, the Trial Court entered an order which addressed the following topics: (1) the continuation of Father's supervised visitation; (2) medical insurance coverage on the children and payment of health insurance costs not covered by insurance; (3) a requirement that the parties and the children continue counseling; (4) the amount of Father's child support payment. Other incidental matters were addressed by the Trial Court. The Trial Court never mentioned a change in designation of primary residential parent status because no request for such a change had been made. The Trial Court's order did state that "This Order is a temporary order of the Court and may be modified at the Court's discretion."

A supplemental order was entered in August of 2006. This order addressed where the parties and their children were to undergo counseling and who would be responsible for payment of the costs of that counseling.

In January of 2007, the Trial Court entered an Order on Status Conference and scheduled the next hearing date. The order does not state what matters still were pending between the parties. However, the Trial Court did state that Father's visitation no longer had to be supervised. The Trial Court also noted that expert witnesses would be testifying at the hearing.

Following a hearing on May 14, 2007, the Trial Court entered an Order on June 13, 2007, designating Father as the children's primary residential parent. The Trial Court ordered the children to be returned to Tennessee. The Trial Court ordered Mother to begin paying child support once the children returned to Tennessee.

Mother appeals raising several issues, all of which attack the propriety of the order changing custody. We have determined that the first issue raised by Mother is the dispositive issue. That issue is: "Whether the Trial Court committed reversible error by naming [Father] the primary residential parent of the parties' minor children, when the Father has never even filed a Petition alleging a change in circumstance or otherwise seeking a change in custody?"

Discussion

The factual findings of the Trial Court are accorded a presumption of correctness, and we will not overturn those factual findings unless the evidence preponderates against them. *See* Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). With respect to legal issues, our review is conducted “under a pure *de novo* standard of review, according no deference to the conclusions of law made by the lower courts.” *Southern Constructors, Inc. v. Loudon County Bd. Of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

In *Keisling v. Keisling*, 92 S.W.3d 374 (Tenn. 2002), our Supreme Court decided the following issue: “[W]hether the trial court erred in transferring child custody from one parent to the other when no petition requesting a change of custody had been filed at the time of the ruling.” *Id.* at 375. The only significant factual difference between *Keisling* and the present case is that the order changing custody in *Keisling* was by its own terms a temporary order. *Id.* at 376. According to the Court in *Keisling*:

Basic due process requires “notice reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *State v. Pearson*, 858 S.W.2d 879, 884 (Tenn. 1993) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 31, 70 S.Ct. 652, 94 L.Ed. 865 (1950)). One of the purposes of pleadings is to give notice of the issues to be tried so that the opposing party can adequately prepare for trial. *See McClellan v. Bd. of Regents of the State Univ.*, 921 S.W.2d 684, 688 (Tenn. 1996).

Due process is a flexible concept that “calls for such procedural protections as the particular situation demands.” *Wilson v. Wilson*, 984 S.W.2d 898, 902 (Tenn. 1998); *Phillips v. State Bd. of Regents of State Univ. & Comty. Coll. Sys.*, 863 S.W.2d 45, 50 (Tenn. 1993). Three factors must be considered in determining the procedural protections demanded by a particular situation: “(1) the private interest at stake; (2) the risk of erroneous deprivation of the interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally (3) the government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” *State v. Culbreath*, 30 S.W.3d 309, 317-18 (Tenn. 2000) (citing *Wilson*, 984 S.W.2d at 902).

Keisling, 92 S.W.3d at 377-78.

After analyzing the three factors set forth above that must be considered when determining the procedural protections demanded by a particular situation, the Supreme Court concluded as follows:

[W]e hold that: (1) the private interest at stake - the continuing custody of one's children - is a fundamental constitutional interest; (2) the risk of erroneous deprivation of custody of one's children is substantial where no pleadings exist informing the parent that a change in custody is being contemplated by the court; and (3) the government's interest as *parens patriae* is not strongly implicated. The magnitude of a parent's constitutional right to rear and have custody of his or her children necessitates that notice satisfying the constitutional requirements of due process be given where a change in custody is at issue. Ms. Keisling's right to due process was violated because there were no pleadings giving notice that custody would be addressed at the hearing. The temporary nature of the trial court's order does not alter our analysis. Accordingly, the trial court erred in granting custody to Mr. Keisling.

Id. at 379-80.

Father argues that the Trial Court intended for Mother's designation as primary residential parent in the Final Decree only to be temporary. The portions of the Final Decree set forth previously lead us to only one conclusion, which is that the designation of Mother as primary residential parent was intended by the Trial Court to be final. Father's attempt to characterize Mother's designation as primary residential parent in the Final Decree as temporary is without merit.

We have carefully reviewed all of the pleadings filed after the Final Decree was entered. We have found no pleading requesting a change in primary residential parent status. Father has been unable to direct this Court to such a pleading. Father argues that the numerous post-Final Decree motions were more than adequate to apprise Mother that custody was at issue. We disagree. The post-Final Decree motions addressed various issues including Father's supervised visitation, his attempt to contact the children, etc. Requesting unsupervised visitation and/or increased visitation is not the same as requesting a change in custody. *Keisling* clearly requires that a pleading be filed giving a party notice that custody is being put at issue. No such pleading was filed herein, and we disagree with Father's argument that the various post-Final Decree motions were sufficient to satisfy the requirements of due process in this case.¹

Because Mother was not given adequate notice that custody was at issue in this case, we vacate the Trial Court's order designating Father as the primary residential parent. Our resolution of this issue renders all of the other issues raised by Mother moot. We express no opinion

¹ After oral argument, Father filed a motion to supplement the record. The purpose of this motion was to provide additional information which Father claims bolstered his argument that the various post-Final Decree motions were sufficient to apprise Mother that custody was at issue. The supplemental information contains little new information and certainly contains no citation to any pleadings which inform Mother that custody was at issue. In an attempt to be thorough, we did review the supplemental information and for that reason, we will grant Father's motion to supplement the record. Again, we emphasize that this additional information contained no citations to any pleadings sufficient to apprise Mother that custody was at issue or which otherwise would satisfy due process requirements.

on whether the facts at the most recent hearing were sufficient to support a change in custody, and this Opinion should not be interpreted as prohibiting Father, after remand, from putting custody at issue with the filing of a pleading actually informing Mother that he is seeking a change in custody.

Conclusion

The judgment of the Trial Court is vacated and this cause is remanded to the Trial Court for collection of the costs below. Costs on appeal are taxed to the Appellee, Keith Anthony Leeper.

D. MICHAEL SWINEY, JUDGE